In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANTS,
v.
GEORGE R. GLEASON AND GEORGE W. Gosnell, appellees.
No. 59.

BRIEF OF ARGUMENT ON BEHALF OF THE APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal from two judgments rendered against the appellants by the Court of Claims for the alleged breach of two certain contracts made between the appellants and the appellees for the excavation of certain earth and rock material for the enlargement of the Louisville and Portland Canal at Louisville, Ky. Inasmuch as the same questions of law were presented in both cases, they were consolidated in the court below and heard together as one case.

Case No. 17782 is commonly called the "upper work." The work to be performed consisted of earth and rock excavation over an area of about 1,600 feet in length and about 450 feet in width and to a depth of about 4 feet. The object of the proposed excavation was to gradually increase the width in the navigable channel leading into the canal and incidentally to enlarge the harbor room at the port of Louisville, Ky.

Case No. 17783 is commonly called the "lower work." The work to be performed here consisted of the excavation of about 137,000 cubic yards of earth and rock for the enlargement of the basin of the Louisville and Portland Canal, at the head of the locks. The object of this proposed improvement was to create a large space in the canal where upgoing and downcoming boats would lie to and permit others to pass them. In the old state of the canal there was a width of only about 90 feet from the head of the lock to a point opposite the dry dock, which permitted the passage of only one vessel at a time. The enlargement of the basin just above the lock was to be made for the purpose of permitting vessels to pass at that point, and thus facilitate locking with greater rapidity.

The original contract for the upper work required that the appellants should commence work on or before August 20, 1885, and complete the same by December 31, 1886 (contract, record, p. 10). The season from August, 1885, was unusually favorable for the prosecution of this character of work, yet the contractors wholly, by reason of their own wrong, default, and neglect, failed to perform the work, and only completed 14 per cent thereof (Finding II, record, p. 31). Whereupon, as a

matter of grace, and without any pretence of right, they asked that the time for the completion of their contract be extended to December 31, 1887, which request was granted by the Government engineer in charge of the work, under certain conditions embraced in a supplemental contract (record, p. 32). Again the season was unusually favorable and again, by reason of their own default and neglect and not by reason of any fault or neglect on the part of the appellants, they failed to complete the work or to make any satisfactory progress in it; and again, as a matter of grace and without any pretense of right, they asked for a further extension to December 31, 1888, making profuse promises for the increase of the plant, working force, etc., and again, as a matter of grace, the time was extended upon the express condition that the appellees faithfully carry out the promises contained in their letter of application, and warning them that "any failure to carry out these promises will terminate your contract." (Record, pp. 16 and 17.)

The contract for the lower work provided (Record, p. 24) that the contractors should commence the work on or before February 1, 1887, and complete the same by December 31, 1887. The period embraced in the terms of this contract was favorable for the performance of the work and the failure of the claimants to complete the same was not in anywise due to the force or violence of the elements, but wholly to their own fault or neglect (Finding XIX, Record, p. 39). An extension of time was asked for the completion of this work to the 1st of June, 1888, said extension being requested purely as a matter of grace and without any pretense of right. And

similarly an extension was asked to August 31, 1888, and again to December 31, 1888, all of which said requests were granted as matters of grace, without any demand on the one part of recognition on the other of a legal obligation so to extend, the failure to complete the work within the various periods mentioned being wholly due to the fault of the claimants themselves and not in anywise chargeable to the appellants, or to the conditions of the weather (see Record, pp. 39 and 40.)

Thus we have the history of the two works done to the end of the season of 1888. That season was a very unfavorable one for the prosecution of this work, and the frequent freshets greatly hindered its performance. At the end of that season application was made for further extension of time within which to complete both works. It was refused. The Government engineer in charge of the work refused this request because (see Record, p. 51, folio 75) of the failure of the appellants to either finish their work at the time called for by the last extension of the contracts, or to make any proper provisions for the carrying on of the work; because the contractors did not fulfill the conditions upon which their time had already been extended; because the leniency which he had already shown the contractors in extending one of the contracts twice and the other three times had not brought forth such efforts on the part of the contractors as the circumstances required; because their previous performance held out no hope of better efforts on their part in the future, and because, in the exercise of his best judgment upon the stipulations of the contract, he did not

consider it just and reasonable that the contract should be further extended.

Both contracts provide that:

> If the party or parties of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable, but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

Under this clause of the contract, it is contended that the appellees were entitled to a further extension of the time within which to complete the work, because, notwithstanding their failure to perform their contractual covenants in the past, they were prevented, during the period of this last extension, from completing the works on account of ice and freshets, and were consequently entitled, as of right under this clause of the contract, to an additional extension of time. The Court of Claims concurred in this view, and held that the refusal of the appellants to further extend the time after the season of 1888 was a breach of the contract on their part, and proceeding upon the notion that the appellees were prevented from completing the work by the wrongful act of the appellants, the court below entered judgment in favor

of the appellees for what they are pleased to call the difference between the cost of doing the work and the contract price, amounting in the two cases to the sum of $68,777.99. From this judgment the case comes to this court upon appeal.

ASSIGNMENT OF ERRORS.

The court below erred:

1. In holding that there subsisted during the season of 1888 any contractual provision whereby the appellees became entitled as of right to a further extension of time by reason of the existence of ice, freshets, or the force and violence of the elements during that season.

2. In construing the word "may," as contained in the contract, to mean "shall."

3. In holding that the decision of the engineer in charge concerning the right of the appellees to a further extension of time was not final, but was subject to the review of the court.

4. In holding that the engineer in charge did not render a decision upon the question of whether or not the appellees were entitled to a further extension of time.

5. In holding that the refusal of the appellants' agent to further extend the time after the season of 1888 was a breach of the contract on the part of the appellants.

6. In rendering judgment against the appellants and in favor of the appellees in any sum whatsoever upon the facts found.

7. In rendering judgment in favor of the appellees and against the appellants in any sum beyond the total sum of $5,412.99.

BRIEF OF ARGUMENT.

The appellees were only entitled as of right under the contract to an extension of time for the commencement or completion of the work described, in the event that they were prevented from commencing or completing said work by reason of ice, freshets, or the force and violence of the elements, within the periods mentioned in the original contract; and if not so prevented during that period, there is no such right given to them in the future, unless again contracted for, although the time for completion was thereafter extended as a matter of grace.

The clause of the contract upon which the judgment of the court below is made to rest (Record, p. 11) is as follows:

> Provided, however, that if the party or parties of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time *may*, in writing, be allowed to him or them for such commencement or completion as, in the judgment of the party of the first part or his or their successors, shall be just and reasonable; but *such* allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

The court below held that this clause of the contract related, not only to the period of time embraced in the original contract, but also to all of the periods of time

embraced within the several extensions that were granted to the appellees for the completion of these works. They held that the word "may" must be changed to read "shall" and that the appellees, notwithstanding their failure to complete the work within the contractual time by reason of their own default and notwithstanding the generous extensions of time that had been granted to them, were yet still entitled as a matter of contractual right to some further extension whenever, at any time, the work was hindered or delayed by ice or freshets. We submit that this construction is wholly at variance with the letter and spirit of the contract, in violation of the letter and spirit of the various extensions of time that were given them and discordant with every inherent fact and circumstance surrounding the parties.

What was it that these men contracted to do?

On the upper work they contracted to begin work on or before the 20th of August, 1885, and to complete the same by the 31st of December, 1886; on the lower work they contracted to begin on or before February 1, 1887, and to complete the same by December 31, 1887. They further contracted that if they did not begin the work on those dates, or if they failed to diligently prosecute the same, the engineer in charge might annul the contract. It was further contracted that if they were prevented by ice floes, freshets, or the force and violence of the elements and by no fault of their own from commencing or completing the work on the above-recited dates, then they might be entitled to such additional time as the engineer in charge should deem just and

reasonable. It was also contracted that *such* an extension (that is, an extension given because they were unable to begin or complete the work on the above-recited dates by reason of the elements) should "not affect the rights and obligations of the parties, but that the *same* (i. e., the *rights and obligations*, not the *time*, as the court below states in its opinion) shall subsist and take effect as though it was the original date agreed upon."

It is admitted on all hands and is so found by the court (see Findings II and IX, record, pp. 31 and 39) that the time embraced in these contracts was a favorable one for the prosecution of this work, and that they were in nowise prevented from beginning or completing the same within the time therein mentioned by reason of the ice or freshets or the conditions of the weather, or by any cause beyond their own control. Their right to demand any extension of time for this reason was therefore at an end. And it was at an end for all time unless this contractual stipulation was expressly renewed by a subsequent covenant to that effect. This stipulation referred only to a right of additional time where the parties were prevented from commencing or completing the work within the time mentioned in *that* contract. The last clause of the contract providing that such extensions should not impair the obligations of the contract, but should subsist and take effect as though it was the date originally agreed upon, upon which so much stress is laid by the court below, refers only to *such* extension or change in dates as is mentioned in the preceding sentences, to wit, such additional time as the engineer might grant them

because of their having been prevented from commencing or completing the work *during the periods mentioned in the original contract.* It does not refer to *any* additional time given them *for any other reason*, nor does it refer to their being prevented from completing the work by reason of the condition of the elements at any other time than the times mentioned in the original contract. Not having been *so* prevented during *such* time and no *such* extension having been granted, this clause, of course, has no continuing effect. It is at an end. It can not be revived except by a new contractual stipulation of like import. This was never expressly done. (See record, pp. 32, 33, 39, and 40.)

In none of the correspondence or negotiations concerning the five extensions of time that were granted for the completion of the two works was there ever the slightest hint or suggestion that if the additional time asked for should be granted them as a matter of grace, they should still have a right to demand, as a matter of right, additional time in case they were prevented from completing the work within the extended period by reason of freshets, etc. If any such claim had been made, the extension, in all probability, would not have been granted, for the Government would not have tied itself up in this indefinite way, rendering it practically impossible to say when a work of great public improvement like this should ever be completed. No such claim was made by the contractors nor contemplated by the engineer in charge of the work, nor was such a claim ever made by anyone until the engineer in charge of the work, with his patience exhausted by the claimants' repeated failures and delays,

refused a further extension of time for the completion of this work; and then the claim is made, for the first time, not by the contractors, but by their learned counsel, whom they had sent to interview the engineer upon this subject. If it had been the intent of the appellees to make such a claim, or the intention of the defendants to grant the same, it must have been so conditioned in the supplemental contract of extension. Certainly there would be some evidence of such intent somewhere in the letters or negotiations concerning these various extensions. We look in vain for the slightest suggestion of such a thing, and the best evidence of the fact that no such intention or understanding existed is the absence of all reference to it in the negotiations of the parties.

But it is claimed that in extending the contract the appellants, impliedly if not expressly, extended all of the terms and covenants of the contracts, and that the words "at the time agreed upon in this contract" thereafter had reference by implication to the time agreed upon in the period of extension, so that if prevented during the period of extension from completing, by reason of ice, etc., they were as much entitled to such additional time as if they had been so prevented during the time agreed upon in the original contract. This is a complete *non sequitur*, and it is founded upon a misconception of fact. The appellants did not extend the contract in the sense of extending the legal rights and duties which flowed from it, but merely extended the time for the completion of the work described in the contract, and while, of course, the work was to be done in the manner set forth in the plans and specifications, and the payment for

the work was to be made in accordance with the provisions of the contract, yet it by no manner of means followed that all of the collateral covenants in the contract were impliedly continued in force by the parties in the absence of any express agreement to that effect. On the contrary, the logical conclusion is just the other way. This inference resolves itself into certainty when we observe what was done in the first supplemental contract that was made for the extension of time. In this very clause of the original contract upon which this judgment is founded it is provided that—

> If the parties of the second part shall delay or fail to commence with the delivery of the material or performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the contract, then, in either case, the party of the first part, or his successor, legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party or parties of the second part, and upon the giving of such notice all money or reserve percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States, and the party of the first part shall be thereupon authorized, if an immediate performance of the work or the delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed by section 3709 of the Revised Statutes of the United States.

Here is ample provision for taking the work away from the contractors, of having it done by others, and of charging up the cost to the appellees if they did not faithfully and diligently prosecute the work. Now if, when the time for the completion of this work was extended, it was intended to likewise extend all of the provisions and covenants of the original contract and to continue them all in force, pray what was the reason, necessity, or sense of drawing up a supplemental contract to allow the Government to do precisely the very thing which they were already allowed to do by the above recited provision of the original contract? And yet we find the parties doing this very thing. For in the supplemental contract it is provided (Record, p. 32) that—

> Should the said Gleason and Gosnel fail to employ a sufficient force, not less than three hundred men, or its equivalent in machinery, to finish their work in the required time, then the officer in charge shall be authorized to perform any of the work in his discretion and deduct the cost from any money due or to become due the said Gleason and Gosnel.

Surely there could be no greater proof that, in the opinion of the parties to the contract, the Government would have had no power to do this thing, notwithstanding the provisions of the original contract, unless provision were made for it when the time for the completion of the work was extended, and surely this is the best possible proof that the parties considered that only the time was extended and that the provisions of the original contract were not extended, except so far as embraced in

the supplemental agreements. And if it had been the intent to guarantee to the appellees during these periods of extension the benefit of the freshet clause of the original contract, would they not have provided for it in the supplemental contract, just as was done in the provision above recited? Certainly the best evidence that they did not intend to do it is to be found in the fact that they did not do it. Whatever fine-spun theories of construction may be evolved from these words in the original contract, we have here a practical solution in the construction placed upon the contract by the parties themselves. And it is well settled that the courts will follow such practical construction placed upon the contract by the parties thereto, even though the courts should not be inclined to concur in the same as a matter of legal construction. (See *Chicago* v. *Selden*, 9 Wall., at p. 54; *Toppliff* v. *Toppliff*, 122 U. S., 121; *District of Columbia* v. *Gallagher*, 124 U. S., 505.)

Another and perhaps the controlling reason for inserting the provision in the contract that such increase of time as might be granted by the engineer in charge should not "affect the rights or obligations of the parties, but that the same should subsist and take effect precisely as if the new date for such commencement or completion had been the date originally agreed upon," was to prevent the allowance of such additional time from having the effect of releasing the sureties on the contractors' bond, it being thoroughly well settled that where one is a guarantor on a bond, note, or other instrument for the payment of money, or performance of an obligation by

another, and the time for such payment or performance is changed or extended, without the knowledge and consent of the guarantor, the guarantor is thereby released from his undertaking. The guarantor's undertaking is to insure payment, or the performance by another in strict accord with the provisions of the instrument into which he enters; and the terms of such undertaking can not be varied without his consent, for he can not be forced into a new contract, and any attempt to do so releases him from his original obligation.

As was said by this court in *Sprigg* v. *The Bank of Mount Pleasant* (14 Pet., 201, at p. 208):

> It is no doubt a sound and well-settled principle that sureties are not to be made responsible beyond their contract; and any agreement with the creditor which varies essentially the terms of the contract, without the assent of the surety, will discharge him from his responsibility.

In accord: *George* v. *Andrews*, 60 Md., 26; *Calvo* v. *Davis*, 73 N. Y., 211.

And the desire to avoid this complication was doubtless the controlling reason for inserting the above-recited provision in this contract.

II.

But conceding that this provision of the contract continued in force by implication, still it only provided that in the event of the contractors being prevented by the condition of the elements and by no fault of their own, "such additional time may, in writing, be allowed them for such commencement or completion as in the judgment of the party of the first part shall be just and reasonable." In other words, the engineer in charge is vested with a discretion to extend or not to extend, according as he deems it to be just and reasonable, and his decision upon the subject is final and conclusive upon all the parties.

Under this provision of the contract, we submit that the engineer in charge is vested with a discretion—

First. To extend or not to extend the time for the commencement or completion of this work, according as he may deem it to be just and reasonable to do so or not to do so, under all the circumstances of the case; and

Second. That such decision by the engineer in charge is final and conclusive upon all the parties; that it is not subject to review by the courts, nor can the court set aside such decision because, had it been acting in the stead of the engineer, it would have come to a different conclusion.

First. The provision of the contract is (Record, p. 31):

> Provided, however, that if the party or parties of the second part shall, by freshets, ice, or other force or violence of the elements, and no fault of his or their own, be prevented either from commencing or

completing the work or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as in the judgment of the party of the first part or his successors shall be just and reasonable.

The court below (see opinion, p. 46, folio 69) deliberately changes the word "may" into "shall," thereby changing the permissible discretion into a contractual obligation; and because this discretion was not exercised by the engineer in consonance with the court's notion of "justice and right," they proceed to do what they think the engineer ought to have done, thereby substituting their discretion for that of the engineer, and of enforcing the contract, not as it was written by the parties to it, but in accordance with what the court thought ought to have been written by the parties. And this, we are blandly informed, is done "in order to effectuate the intention of the parties." *How* it effectuates the intention of the parties we are not told, and we look in vain to the instrument itself for any words that support such a notion. On the contrary, the language of the instrument, as well as every inherent probability of the transaction, points to the conclusion that it was the intent of the parties to confine the determination of the question to the engineer in charge. In all matters of estimates, whether of quantity, or of quality, or of method of workmanship, the contract makes his judgment final and conclusive, and in respect to this extension of time it is provided that such extension *may* be allowed as *he* thinks just and reasonable. "If the contract as written did

not express the true agreement, it was the claimant's folly to have signed it." (*Brawley* v. *The United States*, 96 U. S., 168, at p. 173. Quoted with approval in *Simpson* v. *The United States*, 172 U. S., at p. 379.)

As was said by this court in *Kihlburg* v. *The United States* (97 U. S., 401):

> Indeed, it is not at all certain that the Government would have given its assent to any contract which did not confer upon one of its officers the authority in question.

And it is certain that if this discretionary power had not been vested by the contract in the engineer officer in charge of the work no contract whatever would have been made with these claimants.

In *Carter* v. *Creek* (4 H. and N., 412, 417) Pollock, C. B., observed that "if a party seeks to make out that certain words used in a contract have a different acceptation from their ordinary sense he must prove it by clear, distinct, and irresistible evidence." This language is quoted with approval by this court (speaking through Mr. Justice Lamar) in *De Wit* v. *Berry* (134 U. S., 306 at p. 314), and it is universally held that the words of the contract are to be considered in their plain, usual, and ordinary sense. (*Am. Mfg. Co.* v. *Krantowich*, 77 Ill. App. (1899) and cases cited.)

Now, the word "may" naturally and ordinarily and properly means, "Is permitted to; has liberty to" (Bouv. Law Dic., ed. of 1897, 384), and it is used as merely permissive and discretionary; and while, in the interpretation of statutes with the wording of which the public has

naught to do, the word is sometimes construed in a mandatory or obligatory sense, in order to conserve previously existing rights (but never to create new rights), yet the reason for this rule can never exist in the interpretation of a contract the language of which is as much one party's as it is the other's and which is the joint and mutual agreement of both, which said agreement they jointly and mutually agree to express in a certain form of words. In every such case of contract the words employed must be read in their usual and ordinary acceptation in the absence of clear and convincing proof that they were intended to be understood in a different sense. Following this rule of construction, and conserving the evident intent of the parties as well, we submit that the word "may" means just what it ordinarily means in the affairs of life, and it was used to vest in the engineer a discretion to extend the time for the commencement or the completion of this work if, in his judgment, under all the circumstances of the case, he deemed it to be just and reasonable to do so. But in him alone rested this discretion. The contract does not, and did not design to, create any duty or obligation to extend the time. If such had been the intent of the parties, the whole English language was at their disposal in which to say so plainly and unmistakably. Slightly paraphrasing the language of Mr. Justice White in *Simpson* v. *The United States* (172 U. S., at page 381):

> If such had been the intent of the parties, a purpose so vital, so important, would necessarily have found direct and positive expression in the bid and

> specifications and would not have been left to be evolved by the forced and latitudinarian construction of the word "may."

The only change that is made in this phraseology is the substitution of the word "may" for the word "available." In the Simpson case an effort was made to elicit from the court a "forced and latitudinarian" construction of the word "available" in order to "effectuate the intention of the parties;" but the court said that the intention of the parties must be gathered from the instrument which they drew up, and denounced this attempt to supply the parties with hindsights in the above-quoted piece of virile English. Every word of the quotation is equally applicable here and we submit that the deliberate use of the word "may" was done in order to vest in the engineer in charge an absolute discretion to extend or not to extend the time for the completion of this work; and that when the engineer decided not to extend the time there was an end of the matter, for—

Second. Such decision is final and conclusive on all the parties and is not reviewable by the courts.

As was said by this court in *Quinn* v. *The United States* (99 U. S., at p. 32):

> It may be very well contended that the engineer in charge is, by the agreement of the parties, made the judge of the existence of "such delay or inability to proceed with the work in accordance with the contract" as justifies him in taking it away, and that his action in that regard is conclusive.

The court further says that the "counsel for the United States have not assumed that ground here, and it is not

necessary to the decision of this case," thus very plainly indicating that if such position had been taken and the decision of the point had been necessary the court would have so held.

This position has never been taken by counsel for the Government, so far as we have been able to find after considerable research among the cases and briefs of counsel; but we apprehend that the reason for it is to be found in the fact that no case precisely like the one at bar seems ever to have been litigated either in this court or in the Court of Claims. The position which has been taken by counsel for the Government in this class of cases is that, while the decision of the engineer in charge may be reviewed by the court under some circumstances, yet it can never be set aside except for actual or constructive fraud. But the court will observe that the decision of the engineer which is referred to in all of the cases in which this doctrine is announced by the court is a decision upon physical facts, such, for example, as measurements of earth or areas of excavation, or the quality and amount of work done and the giving of estimates upon the work done, or to be done, and the decisions upon questions of fact involving mathematical calculations, being in the nature of an award of the amount due to the claimants. In cases of this kind the courts have uniformly held that where the contract provides that the decision of the engineer in charge concerning these matters shall be final, said engineer acts in the nature of an arbitrator, and that when he makes his award under such contract, it is conclusive upon all parties, unless tainted with fraud or such

gross error as necessarily implies bad faith. But the decision of the courts in that class of cases can have no application to a case like the one at bar, where the decision sought to be reviewed is a psychological determination and not an action upon physical facts. It is not given to the courts to sound the depths of another's conscience with a plummet to determine whether his moral judgment was such as it ought to have been; nor, on the other hand, is it permitted to a court to place its moral instincts in the place of those of the person selected in the contract and to say that in its moral judgment such and such a thing ought to have been done because it was "just and reasonable." What is "just and reasonable" to one man may not be so to another; and we submit that when a question of that sort is left by the free contractual act of the parties to be determined by one person, his determination thereon is and ought to be a complete finality. The contract provides that the engineer in charge of the work shall be given the discretion (subject to the approval of the Chief of Engineers) to grant such extension of time as in his judgment he shall deem "just and reasonable." It does not provide that such extension may be given by him for reasons which any other person may deem just and reasonable, and for a court to undertake to pass upon that question would be for them to undertake to exercise that ministerial discretion which, by the contract, is vested in the Engineer only. This is not interpreting the contract; it is making a new contract. It is not the exercise of judicial functions, but of contractual rights.

We therefore submit that the determination of this question by the engineer in charge is final and conclusive, and can not be inquired into nor set aside by the court.

III.

Even if held to be reviewable, the decision of the engineer can not be avoided nor set aside, unless it affirmatively appears that such decision was brought about by actual or constructive fraud.

Even in those contracts where the engineer in charge is given power to decide upon questions of quantity, material, and measurement, it is uniformly held that such decision on the part of the engineer can only be set aside where the whole record discloses that his decision was brought about by fraud, either actual or constructive. This is sometimes stated by the courts in words which, at a cursory glance, would seem to indicate something less than fraud, but when the words are analyzed it will be seen that they mean fraud, either actual or constructive. For example, where the courts say that the engineer's decision will not be set aside except for fraud or such gross error or mistake as implies bad faith, or the failure to exercise an honest judgment, such language amounts to nothing more than to say that his decision will not be set aside except for actual or constructive fraud; for, of course, if the deciding person does not exercise an honest judgment, he must needs exercise a dishonest one, and if the facts are such as to show such a gross error as would imply bad faith, then the officer is guilty of fraud,

actual, although not necessarily intentional. It must, therefore, appear that the decision of the engineer was brought about by actual or constructive fraud, and the burden of proving this is always upon him who seeks to set aside the engineer's decision. No other nor different proof will suffice, and the courts can not review nor set aside the decision of the engineer for any other reason, nor because they, acting in his stead, would have come to a different conclusion. This doctrine is nowhere better expressed than in the decision of the circuit court of appeals in the case of *Ogden* v. *The United States* (60 Fed. Rep., 725, at p. 727), where the court say:

> In the absence of fraud or such gross error as would imply bad faith, his decision must be held as conclusive on the appellee. That a court acting on the testimony in the record might have decided differently from the referee in the matter of the appellant's claim does not warrant the setting aside of the decision of the engineer in charge of the work.

Such in effect is the ruling of this court in *Sweeney* v. *The United States* (109 U. S., 618); *Railroad Company* v. *March* (114 U. S., 549, 553); *Railroad Company* v. *Price* (138 U. S., 185), and of the Court of Claims in the case of *Kennedy* v. *The United States* (24 C. Cls. R., 139).

In the case of *Railroad Company* v. *March* (*supra*), the action was brought under a contract for grading a railroad which contained the provision that the final estimate of the work done, material furnished, and the amount due therefor, made by the engineer of the company, should be final and conclusive upon the parties. The trial court charged the jury that the final estimate of the engineer was conclusive, unless it appeared from the evidence that

he was guilty of fraud or intention of misconduct *or gross mistake*. This court declared this charge to be erroneous because the court did not inform the jury that the mistake must be *so* gross or of such a nature that it *necessarily implied bad faith* on the part of the engineer. And this decision is cited and followed by the United States circuit court of appeals in the recent case of *Elliott* v. *The Railroad Company* (74 Fed. Rep., 707, 711), and in *Railroad Company* v. *Price* (*supra*), this court quoted from *Railroad Company* v. *March* (*supra*), and declared that the incompetence or negligence of an engineer in such a situation would not meet the requirements of the suit to be relieved from the effects of his estimates, unless his mistakes were so gross as *necessarily to imply bad faith*. And in the recent case of *Gilmore* v. *Courtney* (158 Ill., 432, 437), it was held that where a party voluntarily enters into an agreement that a third person shall estimate the work done and pass upon its quality, with power to reject and condemn all materials which, *in his opinion*, did not conform to the contract, he can not evade or disregard it except for fraud clearly proven.

The court below admits the soundness of these doctrines and confesses that if the engineer in charge had allowed *any* additional time on account of freshets, etc., during the period of the last extension, such time would have been final and conclusive and could not have been extended by the court. The court below said (opinion, record, p. 46):

> As to what additional time would be just and reasonable he, as the engineer officer in charge, was to determine, not by the exercise of arbitrary power,

but by the exercise of a just and reasonable judgment, and any additional time thus allowed would have been final.

But the court below are of opinion that the engineer did not rest his refusal to extend upon *that* ground, and, being further of the opinion that it was not competent for him to base his refusal upon any *other* ground, they proceed to award to the appellees all of the profits which they would have made if they had completed the work under the contract. In other words, judgment is rendered against the United States not because the contract was improperly annulled, but because it was annulled for an improper reason. This, we submit, is a mixed error of law and of fact. On page 51. folio 75, of the record the engineer in charge of this work gives his reasons for refusing any further extension of time, as follows:

> First. The failure of said Gleason and Gosnell to either finish their work at the time called for by the last extension of said contracts, or to make proper provisions for carrying on the work.
>
> Second. The said contractors did not fulfill the conditions upon which their time had already been extended.[1]
>
> Third. That the leniency already shown said contractors in extending one of the contracts twice and the other three times have not brought forth such efforts on the part of the contractors as the circumstances required.
>
> Fourth. That previous performance held out no hope of better efforts on their part.
>
> Fifth. That the faults of said contractors deprive them of the right to demand further extensions.

[1] As to what these conditions were, see Finding IV, record pages 32–34.

And he further states that he exercised his judgment in the fullest degree upon the contractual stipulation relating to the extension of time, taking into consideration all of the facts of the case.

Now, let it be borne in mind that the contractual proviso, which guarantees, as the court below seem to think, this right of extension of time when prevented by the elements, also carefully couples with it the provision that the failure to complete must arise *solely* from that cause and must not be in any wise caused by any fault of the contractors. And whether this failure to complete was or was not wholly or in part caused by the fault of the contractors was, like all of these other questions, solely for the decision of the engineer in charge. This decision he made, as shown above. He says that he refused any further extension because the claimants did not carry out the conditions upon which the last extension was made and because the faults of the contractors deprived them of any right to further extensions of time. This is necessarily a decision that during the period of the last extension the contractors failed to complete, not wholly by reason of the elements but also by fault of their own. Having so decided, the contract, even in the construction placed upon it by the Court of Claims, gave him full power to annul the instrument, which he did. We submit that the establishment of this fact utterly destroys the narrow technicality which is the sole foundation of the judgment of the court below.

But we further submit that the engineer was not required to base his decision solely upon this or any other special ground, it being sufficient for him to act as he

deemed "just and reasonable" in the premises under all the conditions and circumstances of the case.

The theory upon which the court below proceed is that by the terms of the contract the engineer was made an arbitrator for the determination of this question between the claimants and the United States, and as such arbitrator he failed to exercise that degree of disinterestedness and attention to the claimants' rights and interests which he should have exercised as an impartial umpire between the two parties to the contract. We submit that there is nothing in this contract upon which any such notion can be properly founded. The contract does not create an arbitrator, in the legal sense of that term, out of the engineer in charge of this work, and invest him with the Poo-Bah functions which the learned court below have invested him with, but merely provides for the creation of a ministerial agent who is to determine whether or not, under all the facts and circumstances of the case, the claimants were prevented from completing the work by reason of any fault or neglect of their own, or whether such noncompletion within the time specified by the contract was solely caused by ice, freshets, or the force and violence of the elements; and if solely caused by the latter, whether or not, in his judgment, the facts of the case would warrant him in extending the time for the completion of the work, and if so, what amount of extension would, under all the circumstances of the case, be just and reasonable.

The court will observe, therefore, in the first place, that before the claimants can make any claim whatever for an extension of time the engineer in charge of the

work must be satisfied that the failure to complete the work within the time prescribed by the contract was not due to any fault on the part of the claimants, but, on the contrary, was wholly brought about by the force and violence of the elements. In the second place, even after being so satisfied, he is invested with a discretion to extend or not to extend the time, as he pleases. The contract does not say that the contractors under these circumstances *shall* be entitled to any additional time, but that "such additional time *may* be, in writing, allowed as in the judgment of the engineer shall be just and reasonable," thereby leaving the whole matter of extension entirely within the discretion of the engineer in charge of the work. If the engineer under these circumstances granted an extension to the claimants, or did so as a matter of grace and not because he was required to do it by anything contained in the contract, the right to extension of the time in case of prevention by the force and violence of the elements could not be demanded by the claimants as a matter of right, but could only be appealed for as a matter of grace, trusting to the sense of "justice and reasonableness" of the engineer in charge. In the third place, even if the engineer concluded to extend the time at all, there is nothing in the contract which requires him to extend for any definite period or without reservation or conditions, but, on the other hand, the contract merely authorized him to do so for such time as, in his judgment, will under all the facts of the case be just and reasonable.

To the engineer in charge, therefore, is left the sole and exclusive discretion with reference to this extension.

The contract provides that *he* may extend if in *his* judgment *he* deems it reasonable. It does not provide that the court may extend, if the court thinks it just and reasonable; and the measurement of this justice and reasonableness is, by the terms of the contract, expressly made the conscience of the engineer in charge; and now to attempt to delegate the decision of that question to any other person than the one named in the contract would be the making of a new contract and not the enforcement of the one which the parties themselves made. The making of new contracts under the guise of interpretation is the exercise of contractual and not judicial functions. Courts can not make new contracts for parties, and their functions are solely to enforce the ones which the parties did make. Under the contract which the parties entered into in this case, the engineer in question was vested with a ministerial discretion rendered absolutely necessary by reason of the exigencies attendant upon the prosecution of the work. In the exercise of this ministerial discretion, the engineer in charge of the work, after having extended the time for the completion of the work for such period as he deemed to be just and reasonable, and the claimants still not completing the work, he did not consider that any further extension of time should be granted to them, for the reason that their failure to complete within the period of extended time was not due to the force and violence of the elements, but to their own fault and neglect. His decision in this regard is and must be conclusive upon all parties. There is no question of arbitrament raised by this provision of the contract, and the engineer, in

making this determination, did not act as an arbitrator or as an umpire, but as a final and conclusive judge, in whom was vested the exercise of a ministerial discretion.

The decision of the engineer, under the provisions of this contract, is no more of an award by a referee than was the decision of the Secretary in the case of *Gordon* v. *The United States* (7th Wall., 188), which is cited by the court below to sustain the notion that this engineer acted as an arbitrator. In that case an act of Congress referred a claim against the United States to an officer of one of the executive departments to examine and adjust. This act of Congress was accepted and acted upon by the claimants. The officer to whom the claim was referred examined and adjusted the same and made a certain allowance to the claimants, which the claimants were willing to accept. The Congress subsequently passed an act repealing the one referring the claim to the officer and the claimants contended that the reference under the first act was one of arbitrament and award, and therefore that the Congress had not the power to repeal the provisions of the act; but this court held that the reference did not constitute a case of arbitrament and award, and that the act repealing the former act was valid, the court (at p. 194) saying:

> As respects the effect of the repealing statute of March 2, 1861, the whole argument urged on behalf of the appellants is founded on a false assumption. It is asserted that this is a case of arbitrament and award and was binding as such on the Government, and that the repeal of the resolution of Congress could not affect or invalidate rights

> vested by the award previously made under it. But the Secretary of War was not an arbitrator. An arbitrator is defined as a private extraordinary judge, chosen by the parties who have a matter in dispute, invested with power to decide the same. The Secretary of War acted ministerially. The resolution conferred no judicial power upon him. In order to clothe a person with the authority of an arbitrator, the parties must mutually agree to be bound by the decision of the person chosen to determine the matter in controversy.

We look in vain through this contract for any provision whereby the parties have agreed to be bound by the decision of the engineer in charge of the work concerning his action in granting or refusing an extension of time, and under the authority of the decision just quoted it is manifest that no case of arbitrament and award can be made out under this contract. The engineer in this case acted ministerially, just as the Secretary did in the Gordon Case, not determining the rights of the plaintiffs or the defendants as a judge or an arbitrator or umpire, but simply exercising a ministerial discretion vested in him by the terms of the contract.

As was said by this court in the case of *Kihlburg* v. *The United States* (97 U. S., p. 401):

> Indeed, it is not at all certain that the Government would have given its assent to any contract which did not confer upon one of its officers the authority in question.

The case of the *Crane Elevator Company* v. *Clark* (80 Fed. Rep., 705), cited and relied upon by the court below, is misapplied, and is not an authority for the application

which has been made of it by the Court of Claims. That case was an action of assumpsit brought by the plaintiff in error to recover an unpaid balance of the contract price for furnishing and constructing a certain building with certain passenger elevators. The declaration contained a special count setting forth the contract with the plaintiff in error, which contained the following provision:

> One-half of the contract price shall be paid when the cylinders are in permanent position; the balance when the plant is running to the satisfaction of the architect and has been accepted by him.

The special count alleged performance of the contract and that the elevators and each of them were accepted by the architect. The declaration contained a special count upon an independent agreement touching which there was no controversy, and it also contained the common counts. The plea was the general issue. At the trial the plaintiff gave evidence tending to prove: The performance by it of the work specified in the contract; that the plant was tested to determine whether the contract had been performed with reference to speed and load. This test was prearranged, the defendant and the owner of the building being present. The architect was notified of the test to be made and was requested to be present, or to be represented, at such test, and promised to be represented and was represented by his assistant, who, after the conclusion of the test then and there expressed his satisfaction, stating that the test as to capacity and the speed of the elevators fulfilled every condition of the contract, and that he was perfectly satisfied with

it. That upon application to the architect for a certificate, he, the architect, made no specific objection, but stated certain objections that had been urged by the owner of the building. The defendant gave evidence tending to prove that in certain respects the contract had not been performed. The architect testified that the elevators were not completed to his satisfaction and had not been accepted by him; that he declined to give a certificate "until the work was completed according to contract;" that he thought he gave some reasons, "as I usually do," but could not recall the reasons, if any, that he gave. He did not at the trial give any particulars wherein the work was defective or incomplete. He stated that before the test he had observed the elevators did not start and stop properly, and were too noisy; that he was not an expert with respect to elevators, and he does not state whether the failure to start and stop properly was owing to a defect in workmanship or in operation; that noise is incidental to the operation of all elevators; that he received from the owner a letter which states that he is informed that he, the architect, contemplated acceptance of the elevator plant and states certain objections, closing as follows:

> I do most positively protest against the acceptance of the elevators in my name, or in my behalf, and forbid you to do so.

A copy of this letter the architect sent upon the following day to the plaintiff in error, without comment. There was no evidence of any report made by the architect's assistant to him, nor was the said assistant called

as a witness. There was also evidence tending to prove that after the test the owner took possession of the elevators and contracted for their operation, and evidence was given to the effect that the objectionable noise arose from the operation of an electric pump, placed at the request of the owner and contrary to the advice of the plaintiff in error. At the conclusion of the testimony and upon motion of the defendant, the court directed a verdict for the plaintiff in error for the amounts which were undisputed, and refused to submit to the jury the right of the plaintiff to recover the unpaid balance upon the contract, the court being of opinion that no recovery could be had upon this item, unless, except and until the architect's certificate had been obtained that the work had been completed to his satisfaction—holding that under the contract such certificate was a necessary prerequisite to the institution of the suit and that recovery of the unpaid balance could not be had upon the common counts. This ruling of the court below was reversed by the circuit court of appeals, which held that the plaintiff in error had a right, under the pleadings, to recover the unpaid purchase money under the common counts, in case he were able to satisfactorily prove that there had been a substantial compliance on his part with the contract and that he had been unable to obtain the architect's certificate, because that person had arbitrarily refused to give it and that the plaintiff in error was entitled to have this question submitted to the jury for determination. The court was of opinion that the plaintiff in error was entitled to the independent and honest judgment of the

umpire with reference to whether or not the contractors had fulfilled the conditions of the contract and that the architect could not, merely relying upon objections to the elevators made by the owner of the building, refuse to give such certificate and refuse to exercise his judgment in the premises one way or the other; that the architect under this contract was made an arbitrator between the parties upon this point, and that his willful and arbitrary refusal to act or to exercise his judgment constituted a fraud in law, availing to dispense with the necessity for his judgment as a condition precedent to the right of recovery by the contractor for the work done.

It will be readily seen, therefore, how utterly different are the essential elements of this case from the case at bar. Here there is drawn in question no matter of arbitrament nor the exercise of quasi judicial functions, but merely the exercise of a ministerial discretion. Here there has been no arbitrary refusal to accept an executed contract, but merely a refusal to extend the time for the completion of an executory one. Here there has been no passive acquiescence in the owner's objections and the refusal to exercise the judicial judgment with which the arbitrator was charged by the contract, but, on the contrary, a full and complete exercise by the engineer of the discretion vested in him and the doing of what to him seemed just and reasonable under all the circumstances of the case. Here there is no question of the right to recovery under the pleadings without first obtaining the architect's certificate, and here there is no question of awarding the balance due under a contract, which has been honestly and in good faith performed by the plaintiff,

certainly in substantial compliance with the contract, if not literally, and to avoid which is interposed merely the technicality of the absence of an architect's certificate, but of awarding prospective profits to one who alleges that he could have completed if he had been given all the time that he wanted. We submit that there is no analogy whatever between the two cases and that the Crane Elevator Case is in no sense conclusive of the issues here involved.

IV.

The facts found are not sufficient to support the judgment rendered by the court below.

The findings of fact by the Court of Claims are a special verdict (*United States* v. *Smith*, 94 U. S., 214), and like every other special verdict they must contain of and in themselves, without the slightest reference to the testimony, or by any process of piecing together, every essential fact necessary for the resultant judgment. The special verdict is one by which the facts are found and the law is submitted to the judges. A special verdict, in order to sustain the judgment, must pass upon all the material issues made in the pleadings, so as to enable a court to say, upon the pleadings and verdict, without looking at the evidence, which party is entitled to a judgment. (2 Bouv. Law Dic., ed. of 1897, title "Verdict.")

In the case of *Ward* v. *Cochran* (150 U. S., 507, at p. 608) this court, through Mr. Justice Shiras, said:

> Where a special verdict is rendered all the facts essential to entitle a party to a judgment must be

found, and the judgment rendered on a special verdict failing to find all the essential facts is erroneous.

In the case of *Prentice* v. *Zane's, administrator* (8th How., 370, 483), it was said:

> In the *Chesapeake Insurance Company* v. *Starke* (6th Cranch., 268); and *Barnes* v. *Williams* (11th Wheat., 415), this court has decided that where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the court will not render a judgment upon such an imperfect special verdict, but will remand the case to the court below, with instructions to award a *venire de novo*.

In *Hodges* v. *Easton* (106 U. S., 408), where it was contended that an imperfect special verdict might be pieced out and the missing facts be supplied by reference to other parts of the record, the same conclusion was reached, and the court below was directed to award a new trial.

In the case of *Newbegin* v. *The National Bank* (27th U. S., App., 712), the court of appeals said:

> This case appears to have been tried by the circuit court upon a written stipulation of the parties waiving a jury, pursuant to sections 649 and 700 of the Revised Statutes. The circuit court made and filed a special finding of facts and ordered a judgment to be entered against the plaintiff. An inspection of the special finding of facts, as contained in the record, discloses to this court that the facts found are insufficient to sustain the judgment. The court first found the existence of certain facts which clearly entitled the plaintiff to a judgment, and thereafter found that the plaintiff's right of action was barred

on the ground of laches, but no facts were found by the circuit court which are sufficient to support the conclusion that the plaintiff's right of action was barred by laches. For these reasons the judgment of the circuit court is reversed and the case is remanded, with directions to award a new trial.

Looking now to the facts found in the special verdict of the court below, it will be readily seen how utterly insufficient they are to support the judgment which is predicated upon them.

The judgment of the court below is:

First. For the profits which the appellees would have made on the two works, if they had been able to complete the same.

Such a conclusion, in order to be sound, must be based upon the following facts:

(*a*) A determination of the *amount* of time that would have been a "just and reasonable" extension.

No limit is fixed by the court below. Would it have been "just and reasonable" to extend the time for six months, or a year, or two years, or for what time? We are not informed; and for aught that appears in the findings of the court below, these appellees had the right of indefinite extension, even if it took a lifetime.

(*b*) A finding that the appellees could and would have completed these works at the profits mentioned, within the time thus determined to be a "just and reasonable" extension.

There is no such finding. On the contrary, the evidence shows that the appellees have already taken *three times* as long to do these works as they originally contracted to do them in, but have only completed some 14

per cent thereof, although each season, down to 1888, was unusually favorable for this character of work (see Finding II, p. 31; Finding XIX, pp. 39 and 40); and we are also informed that the Government did not complete the works during the season of 1889 (Finding XXII, p. 41).

We are not informed whether the season of 1889 was a favorable or an unfavorable one, but we are told that the work was not completed. If the Government, with all of its facilities, capital, and trained forces, could not complete this work in 1889, what right had the court below to assume that the contractors could complete it in that year? Certainly there is nothing shown in their past performance that for a moment hints at such a notion. Or if the court did not assume that they would complete the work in 1889, then did the court assume that they would do it in 1890, or 1891, or 1892, or when? For the court certainly assumed that they would complete it some time or other, and must have assumed it, for they did not find it, and there was no evidence before them upon which they could have found it. The court below has not determined any of these questions, but has merely said that because the appellants refused to grant *any* time when they should have granted *some* time, therefore the appellees are to be awarded all the profits they could have made, as if they had completed the contract under the most favorable conditions at the time when the contract was annulled. It is respectfully submitted that this assumption falls little short of absurdity. The only damages that can be awarded against the United States are those which have been actually sustained by

the appellees. Punitive damages can never be awarded against the United States. Profits can only be awarded when they are proven. There are no facts found by the court below which show that the appellees would have made any given amount of profits, or that they would have made any profits at all, or that they would not have sustained a loss if they had completed the contract. The grounds upon which the general rule of excluding profits in estimating damages rests are—(1) That in the greater number of cases such expected profits are too dependent upon numerous uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote and not as a matter of course the direct and immediate result of the nonfulfillment of the contract; (3) and because most frequently the engagement to pay such loss of profits in case of default in the performance is not a part of the contract itself, nor can it be implied from its language and terms (Sedgwick on Damages (7th ed.), vol. 1, p. 108; *The Schooner Lively*, 1 Gallison, 315, 325, per Mr. Justice Story; *Anna Maria*, 2 Wheat., 327; *Parish* v. *The United States*, 100 U. S., 500, 507; *How.* v. *Stilwell Mfg. Co.*, 139 U. S., 199, 206), and in every case where profits have been allowed as a part of the damages for the breach of contract it has been not only where such profits were not open to the objection of uncertainty or remoteness, but also where, from the express or implied terms of the contract itself, it was fairly and fully shown that the loss of such profits as a measure of damages were within the intent and mutual understanding of both parties at the time the contract

was entered into. (*United States* v. *Beham*, 110 U. S., 338, 345, 346, 347; *Western Union Telegraph Company* v. *Hall*, 124 U. S., 444, 454, 456.)

Now, surely it can not be said from the express or implied covenants of this contract that it was within the mutual contemplation of the parties at the time the same was executed that the contractors should be paid all the possible profits on these jobs in case the engineer in charge refused to extend the time for the completion of the work on account of the conditions of the weather. The appellees are entitled to be and have been paid for all the work done, and are entitled to be paid for such expenditures as were actually and properly made in a bona fide preparation for the execution of these contractual undertakings, including a fair compensation for their personal services, but they are not entitled to anything more. (*Parish* v. *United States*, 100 U. S., 500, 507; *Bulkley* v. *United States*, 19 Wall., 37; *United States* v. *Smith*, 94 U. S., 214, 218.)

In *United States* v. *Smith* (*supra*), this court said:

> The United States can only be required to make compensation to the contractor for damages which he has actually sustained by their default in the execution of their undertakings to him; but this is the extent of their liability in the Court of Claims. More than compensation for damages actually sustained can never be awarded against the United States. * * * In the estimation of damages the Court of Claims occupies the position of a jury under like circumstances. Damages must be proven. The court is not permitted to guess any more than a jury, but, like a jury, it must make its estimates from the proofs submitted.

(*c*) To sustain a judgment for the profits awarded it is necessary to have found that in the future the same industrial and climatic conditions and the same relation of supply and demand would obtain as in the past.

No such finding is made, and manifestly could not have been made. The theory upon which the court below estimated the profits was that in the two most favorable years it had cost 50 cents per cubic yard to crush and deliver this cement rock, during which time, by reason of active street-paving operations in the city of Louisville, which created a large and constant demand for this character of rock, there was a ready market for said stone at the price of $1.25 per cubic yard, resulting in a net profit of 75 cents per cubic yard to the contractors. (Findings XIV, XV, and XVI, Record, p. 37.) And the court, without so finding, and without the slightest evidence upon which to so find, proceeds to assume that the weather will continue as favorable; that the cost of labor and material will remain the same; that Louisville will continue to pave her streets, and that the price of this rock will remain the same throughout the indefinite, undefined, and indefinable stretch of futurity that it awards to the appellees in which to tinker away upon this work. We submit that it is not permissible to mulct the Government in damages by any such Procrustean method as this.

(*d*) To support the judgment rendered, it is essential to have found whether or not the appellees sought for and obtained other employment for themselves, their plant and capital during the period following the rescission of this contract, and to have deducted whatever profits

were thus made from the amount of the judgment rendered.

This has not been done. For aught that appears in these findings, *non constat*, that the rescission of this contract did not result in a very material benefit, instead of a loss to the appellees. By the rescission of this contract their personal services, entire working plant, and capital were released from this undertaking, which otherwise would have consumed them all, and of course it thereupon became, and was, their duty to diligently seek other employment for themselves, their capital, and their plant. They could not sit idly by for an indefinite period and recover from the appellees the prospective profits on a broken contract, when they might have made a great deal more money out of another contract or other employment, if they had only tried to get it. If they diligently sought other work and failed to obtain it, of course the appellants are responsible; but if they succeeded, the profits which they made out of that work while released from the performance of this are to be deducted from the damages awarded, and if they equaled or exceeded the profits which they would have made on this work, then there has been no damage resulting to them from the rescission of this contract, and therefore, of course, there should have been no damages awarded to them by the court below. None of these essential facts are found in the special verdict of the court below, and it is therefore utterly insufficient upon which to rest the judgment so rendered.

The doctrine of avoidable consequences arises from the same principle which refuses to take into consideration any but the direct consequences of an illegal act, and is

applied to limit the damages where the plaintiff, by using reasonable precautions, could have avoided them. The principle is an exclusion of consequences which, inasmuch as the plaintiff can avoid them, do not damage him as a result of the defendant's wrong. They are excluded from recovery as remote. The doctrine rests upon the intervention of the plaintiff's will, as an independent cause; *ad hoc*, he is not damaged by the defendant's act but by his own negligence or indifference to consequences.

A very apt illustration of this principle as affecting the facts in the case at bar is to be found in the case of *Murrill* v. *Whiting* (32 Ala., 54). That case was an action for damages for the defendant's breach of contract under a charter party providing for two successive voyages, "one voyage to be from Mobile to Toulon, and the other from Mobile to an Atlantic port in France," and reserving to the owners of the vessel the right to send her, "after the termination of the first voyage, to any other port in Europe to load for any port in the United States, proceeding from such port to Mobile to commence the second voyage," and the further right, "in case France should engage in war, to annul the contract for the second voyage." On France becoming engaged in war before the termination of the first voyage, the owners of the ship had the option, it was held, to be exercised by them within a reasonable time and notice thereof to be given to the charterer, to annul the contract for the second voyage; but on their failure to exercise this optional right, they were bound to offer, within a reasonable time after the termination of the first voyage, to make the second voyage, unless discharged or

excused by the charterer from making that offer, and, failing to make that offer within such reasonable time, they can not hold the charterer liable, on his abandonment of the contract, for failing to furnish a cargo for the second voyage. It was also held that it was the duty of the master of the chartered vessel, on the failure or refusal of the charterer to furnish the cargo as agreed on, to avail himself of all ordinary means to obtain another cargo, and if he neglected to perform this duty the owners can not hold the charterer liable for the increased damages resulting from such neglect. And upon this latter point the court said:

> The recovery must have been confined to such loss and damages as are direct and immediate, and naturally flow from the breach of contract alleged and proved; in other words, the breach of the contract must be *the cause and not merely the occasion* of the losses or damages in order to entitle the plaintiffs to recover them. (*Moore* v. *Appleton*, 26 Ala., 633, and authorities there cited.) Full indemnity to the plaintiffs for such loss or damages is all that they are legally entitled to recover. If the party entitled to the benefit of the contract can protect himself from the loss arising from the breach at a reasonable expense, or with reasonable exertions, he fails in his social duty if he omit to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable. It is his duty to seek other employment. Idleness is in itself a breach of moral obligation. But if he continue idle for the purpose of charging another, he superadds a fraud which the law had rather punish than countenance. In the absence of special circumstances to the contrary, the

law makes it the duty of the master of such a ship as that of the plaintiffs, in case of the failure or refusal of the charterer to furnish the cargo as agreed upon, to avail himself of the ordinary means and of all proper opportunities to obtain another cargo. If he fail to perform that duty and thereby the damages are enhanced, the owners of the ship can not recover the increase of damages resulting from the voluntary neglect of duty on the part of the master. If by performing that duty the loss from the defendant's breach of the contract would have been mitigated, the failure to perform it deprives the plaintiffs of the right to recover any damages or loss which would have been avoided by its performance. (Citing *Shannon* v. *Comstock*, 21 Wend., 457, 461; *Heckscher* v. *McCrea*, 24 Wend., 304; *Bailey* v. *Damon*, 3d Gray, 92; Addison on Contracts, 1152.)

In further support of these doctrines see *Dillon* v. *Anderson* (43 N. Y., 231); *Hamilton* v. *McPherson* (28 id., 72); *Hodges* v. *Fries* (34 Fla., 63, 76); *Dobbins* v. *Duquid* (65 Ill., 464); *Miller* v. *Mariner's Church* (3 Greenleaf, 51, 55, 56).

In the last-cited case the court say:

> In general the delinquent party is holden to make good the loss occasioned by his delinquency, but his liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. The purchaser of perishable goods at auction fails to complete his contract. What shall be done? Shall the auctioneer leave the goods to perish and throw the entire loss upon the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time and if they bring

> less he may recover the difference, with commissions and other expenses of resale, from the purchaser. If the party entitled to the benefit of the contract can protect himself from the loss arising from the breach, at a reasonable expense or with reasonable exertions, he fails in his social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable.

Second. The second item which goes to make up the judgment of the court below is for the amounts of the retained percentages upon the work amounting on the one contract to $4,011.99, and upon the other to $2,401, making a total of $5,412.99. The theory upon which the Court of Claims rendered judgment for these retained percentages is, that under the contractual provisions these sums were retained by the defendants, not as liquidated damages to be held as a penalty for the noncompletion of the work, but merely as unliquidated damages to reimburse them for such actual loss as the Government might sustain by reason of the noncompletion of the work on the part of the appellees, and that, inasmuch as no special or actual damages to the Government was shown, the appellees were entitled to recover the amounts of these retained percentages. Such has been the uniform holding of the court below upon contractual provisions of this character, and there are decisions in this court which appear to uphold the doctrine. And if the court is of opinion that such is the true construction to be placed upon this contract, this portion of the judgment would be correct, but that should certainly be the extent of the judgment.

It is therefore submitted that, in any view of the case, the judgment of the court below is clearly erroneous, and that the same should be reversed, with instructions to dismiss the petition of the appellees, or to confine the judgment to the amount of the retained percentages, to wit, the sum of $5,412.99, and to dismiss the petition with reference to the remainder of the claim, or that the said judgment of the court below should be reversed, with instructions to award the appellants a new trial.

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